

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A)	Supreme Court
JUDGE, NO. 02-487)	Case No. SC03-1171

RESPONSE TO MOTION TO DISQUALIFY

The Florida Judicial Qualifications Commission, by and through its undersigned Special Counsel, hereby responds to the motion of the Respondent Judge Gregory P. Holder to disqualify Judge John P. Kuder, Judge Thomas B. Freeman, Dr. Leonard Haber, and Mr. Ricardo Morales, III, as members of the panel to hear the formal charges against Judge Holder scheduled for September 20, 2004, and shows as follows:

1. The motion is untimely.

a. The motion to disqualify is made pursuant to Rule 25 of the Rules of the Florida Judicial Qualifications Commission and Rule 2.160 of the Florida Rules of Administration. Commission Rule 25 provides that a judge against whom formal proceedings have been instituted may file an affidavit that the judge fears that he will not receive a fair hearing before the Hearing Panel because of the prejudice of one or more members of the Hearing Panel against the judge.

Rule 25 specifically provides that the affidavit "shall be filed not more than 15 days after service of the Notice of Formal Charges upon the judge charged." Rule 2.160(e) of the Rules of Judicial Administration provides that "[A] motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion...."

b. The Respondent's Motion to Disqualify is based upon the fact that four of the members of the Hearing Panel, Judges Kuder and Freeman, Dr. Haber, and Mr. Morales, were members of an Investigative Panel that had investigated and determined by an affirmative vote of not less than five members that probable cause existed to file formal charges against Judge Holder on an unrelated matter, and, therefore, the four previous panelists had "necessarily formed opinions about, among other things, Respondent's credibility and veracity." (Motion to Disqualify, ¶ 5).

c. The Notice of Formal Charges in this matter was filed and served on July 16, 2003. The first scheduling order setting the formal hearing for January 20, 2004, was furnished to counsel for the respondent on November 18, 2003. That order specifically identified Judges Kuder and Freeman and Mr. Morales as members of the Hearing Panel to hear the case.

Following the granting of a continuance, a second scheduling order was served March 11, 2004, identifying Judges Kuder and Freeman, Dr. Haber, and Mr. Morales as members of the Hearing Panel to hear the case on June 14, 2004. On Judge Holder's motion, a second continuance was granted and a third scheduling order, again identifying Judges Kuder and Freeman, Dr. Haber, and Mr. Morales as members of the Hearing Panel, was served on Respondent's counsel on June 18, 2004, scheduling the formal hearing for September 20, 2004. Therefore, the Respondent has known of three of the four members of the panel whom he seeks to disqualify for approximately nine months, all four members for approximately five months, and for at least two months that the four challenged members would serve on the panel to hear the matter on September 20, 2004. Yet, the Respondent did not seek to disqualify any members of the Hearing Panel identified in either the first or second scheduling orders and waited until five weeks before the formal hearing is to begin to move to disqualify.

d. Although the Respondent could not have known the members of the Hearing Panel at the time of the Notice of Formal Charges, he should have, at a minimum, moved to disqualify Judges Kuder and Freeman and Mr. Morales within

15 days of the first scheduling order, all four challenged members within 15 days of the second scheduling order, and certainly within 15 days of the third scheduling order. Having failed to do so, the motion is now untimely.

2. The Motion to Disqualify is not legally sufficient to require the disqualification of Judges Kuder and Freeman, Dr. Haber, or Mr. Morales.

a. In In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950 (Fla. 1982), the Supreme Court of Florida, under Article V, Section 12, of the Florida Constitution before its revision in 1996, by which the Commission both investigated a judge's alleged violation of the Code of Judicial Conduct and then heard the charges and recommended a punishment, held that the procedure did not violate the judge's right to due process of law. Accord, In re Kelly, 238 So.2d 565 (Fla. 1970), cert. denied 401 U.S. 962 (1971). Similarly, a sitting judge is not disqualified simply because he made an earlier ruling adverse to a party in a separate matter, McGauley v. Goldstein, 653 So.2d 1108 (Fla. 4th DCA 1995), or by making prior adverse rulings in the same case. Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied 516 U.S. 1097 (1996); Williams v. State, 689 So.2d 393 (Fla. 3d DCA 1997).

b. Thus, the fact that four members of the Hearing Panel were members of an Investigative Panel which found that there was probable cause to bring formal charges against the Respondent on an unrelated matter, is not legally sufficient to require their disqualification in this case.

3. For the foregoing reasons, the Motion to Disqualify should be denied.

Respectfully submitted,

INVESTIGATIVE PANEL OF THE FLORIDA
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by facsimile and United States mail this _____ day of August, 2004.

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